Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

KRIS LINDQUIST,

Petitioner,

v.

STEVEN LOBECK and ANDREW WORONKA,

Respondents.

# PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA COURT OF APPEALS

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38 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Does the Florida Court of Appeals' decision conflict with the decision of the Sixth Circuit Court of Appeals in *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998) which found a constitutional duty under identical facts, warranting review by this Court?

2. Does the Florida Court of Appeal's decision that there was no substantive due process violation because the injuries did not occur while "in custody" conflict with the decision of the Sixth Circuit Court of Appeals in *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997), warranting review by this Court?

3. Does Florida Court of Appeals' decision conflict with the decision of the Third Circuit Court of Appeals' decision in *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996), which found a substantive due process violation under the "state created danger" theory, warranting review by this Court?

## PARTIES TO THE PROCEEDINGS

Kris Lindquist

Andrew Woronka

Steven Lobeck

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## PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA COURT OF APPEALS

Petitioners pray that a Writ of Certiorari be issued to review the Judgment of the Florida Court of Appeals entered in this cause on January 28, 1998.

## OPINION BELOW

The opinion of the Florida Court of Appeals is reported at *Lindquist v. Woronka*, 706 So. 2d 358 (Fla. Dist. Ct. App. 1998) (*per curiam*). This opinion is printed in the appendix (A.1) to this petition. The judgment of the Florida Supreme Court, refusing to review the decision of the Florida Court of Appeals, is unreported and is printed in the appendix (A.2) to this petition.

## JURISDICTION OF THIS COURT

The Florida Court of Appeals issued its opinion on January 28, 1998. A timely petition seeking discretionary review was filed with the Florida Supreme Court. The Florida Supreme Court issued an order on July 27, 1998 declining to exercise review of the court of appeals. This petition was filed within 90 days after the entry of the Florida Supreme Court's decision declining to exercise discretionary review. This case concerns an interpretation of 42 U.S.C. §1983 and the due process clause of the Fourteenth Amendment. This court has jurisdiction pursuant to 28 U.S.C. §1257.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. AMEND. XIV, §1 provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process or law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

## STATEMENT OF THE CASE

The Plaintiff brought this action against the Defendants Lobeck, Woronka, City of Riviera Beach, Joseph Proia and Donna Kallio in the Circuit Court of the 15th Judicial Circuit, Palm Beach County Florida, seeking recovery for personal

injuries suffered on January 31, 1993. (R.1-14).[1] The federal constitutional and statutory questions addressed in this Petition were first raised by the Third Amended Complaint. (R.162-182). The Third Amended Complaint was the first pleading in this matter that sought recovery against the defendants under 42 U.S.C. §1983 for violations of Kris Lindquist's rights to substantive and procedural due process under the Fourteenth Amendment. (Third Amended Complaint, Counts V-VIII). The defendants moved to dismiss the Third Amended Complaint for failure to state a cause of action. (R.224-225,226-229, 230-234). The circuit court granted the Defendants' motion to dismiss, but also gave the Plaintiff leave to amend the complaint. (R.289-295). The Plaintiff then filed a Fourth Amended Complaint, which again raised federal claims under 42 U.S.C. §1983 and the Fourteenth Amendment. (R.307-325).

The complaint at issue in this petition is the Fourth Amended Complaint. (R.307-325). This complaint sought recovery against the City of Riviera Beach, Lobeck and Woronka for negligence (Counts I and II) and against these same Defendants for deprivation of Kris Lindquist's substantive and procedural due process rights (Counts III and IV). (R.307-325).[2] In response to the Fourth Amended Complaint, the Defendants moved to dismiss for failure to state a cause of action. (R.326-335, 336-338, 339-340). The City's motion argued that the actions alleged in the negligence counts were judgmental decisions, therefore the

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[1] Pursuant to Supreme Court Rule 14(b)(i) references to the record ("R") are to the record on appeal filed with the Florida Court of Appeals.

[2] Joseph Proia and Donna Kallio settled the claims against them and were not named in the Fourth Amended Complaint.

City was protected by sovereign immunity. (R.337). All three Defendants moved to dismiss Counts III and IV on the grounds that these counts failed to state a cause of action under the federal civil rights act, 42 U.S.C. §1983. (R.337, 339).

After receiving briefs and hearing argument on these motions, the Circuit Court for Palm Beach County, Florida granted the City's motion to dismiss Count II, and granted all of the Defendants' motions to dismiss Counts III and IV. (R.363-366). The Plaintiff then filed a timely notice of appeal of the circuit court's order dismissing Counts III and IV against the Defendants Woronka and Lobeck. (R.383-384, 385-388).[3]

The Florida Fourth District Court of Appeals rendered its decision on January 28, 1998. In that decision, the court of appeals held that the due process clause of the Federal Constitution did not impose a duty on either officers to protect Kris Lindquist, even though there was a "special relationship" between the officers and Kris Lindquist, and even though the officer's actions had increased the harm to Kris Lindquist. 706 So.2d at 360. A notice to invoke discretionary jurisdiction was timely filed with the Florida Fourth District Court of Appeals on February 25, 1998. The Plaintiff then filed a timely petition for discretionary review with the Florida Supreme Court under FLA. CONST. ART. V, §3(b)(3) and Fla. R. App. Proc. 9.030(2)(A)(ii).[4] On July 27,

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[3] The common-law claims in Count I remained against the City, thus the order dismissing the constitutional claims against the City was not a final appealable order against the City.

[4] Under Fla. R. App. Proc. 9.030(a)(2)(A)(ii), the Florida Supreme

1998 by a 4-3 vote, the Florida Supreme Court declined to exercise discretionary review. That same order provided that "[n]o motion for rehearing will be entertained by the Court."

## ARGUMENT

This case falls directly under the criteria listed by this court for discretionary review under Supreme Court Rule 10. Under Rule 10(b), a "compelling reason" warranting review exists when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals."

In this case, the Florida Court of Appeals' interpretation of the Fourteenth Amendment's due process clause and 42 U.S.C. §1983, directly conflicts with the decisions of three federal circuit courts of appeal. First, it directly conflicts with the holding of the Sixth Circuit Court of Appeals in *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998). This case and the *Davis* case concerned identical facts, yet in this case no constitutional violation occurred, while in *Davis* the court found a constitutional violation. Second, the Florida Court of Appeals' decision that there was no constitutional violation because the injuries occurred after Kris Lindquist was released also directly conflicts with the Sixth Circuit Court of Appeals' decision in *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997). Third, the Florida Court of Appeals' decision conflicts with the Third Circuit Court of Appeals' decision in *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996) by

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Court has discretionary jurisdiction to review decisions of a district court of appeal that expressly construe a decision of the state or federal constitution.

reaching different results with similar facts under the "state created danger" theory. Thus, the decision should be reviewed.

## I. The Florida Court of Appeals' decision conflicts with the decisions of the Sixth Circuit Court of Appeals in *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998) which found a constitutional duty under identical facts.

The Florida Court of Appeals' decision directly conflicts with the Sixth Circuit Court of Appeals' decision in *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998), which found a constitutional deprivation under identical facts.[5] It is impossible to reconcile the Florida Court of Appeal's opinion with the sixth circuit's opinion in *Davis*.

In *Davis*, the plaintiff became intoxicated one evening and tried to enter a shelter where he had been staying. The shelter staff refused to admit him because he was intoxicated. The plaintiff became violent, and the shelter called the police. 143 F.3d at 1023. The plaintiff was arrested by two police officers, who took the plaintiff to the county jail. The jail was full, and the two police officers were instructed by the desk sergeant "'to release [the plaintiff] at the county jail if he was not so drunk that he would be a hazard to himself.'" 143 F.3d at 1023. Instead of releasing the plaintiff at the jail, the defendants released him outside of town on a heavily

[5] The *Davis* case was decided before the Florida Supreme Court's order declining discretionary review in this case, and after the court of appeals' decision.

traveled road with few street lights and no sidewalk. 143 F.3d at 1023.

After he was released from custody, the plaintiff made his way to a house, where he asked one of the residents to call the police. A third police officer came to the house and, according to the plaintiff, this police officer refused to give the plaintiff a ride back to town. 143 F.3d at 1023. The plaintiff then left the house and was hit by a car seven minutes after this third police officer left. 143 F.3d at 1023. The plaintiff's blood alcohol was .176 at the hospital, approximately 48 minutes after the last officer left him. 143 F.3d at 1023.

The plaintiff sued the police officers under 42 U.S.C. §1983 for deprivation of his right to substantive due process. The defendant police officers moved for summary judgment, arguing that no constitutional violation occurred. . The district court denied the motion, and, on appeal, the sixth circuit affirmed.

The sixth circuit first began its analysis of whether the plaintiff had established a violation of a constitutionally protected right. 143 F.3d at 1024. The plaintiff in *Davis*, like Kris Lindquist here, alleged a violation of his right to substantive due process. 143 F.3d at 1024. The sixth circuit held that under the substantive due process guarantee, the state does not owe a constitutional duty to protect its citizens from harm. 143 F.3d at 1024. However, relying on this Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the sixth circuit held that a duty was imposed once the state took the plaintiff into custody. By taking the plaintiff into custody, and releasing him on a dark highway, the defendant officers

"imposed upon themselves a duty to ensure that they were not placing [the plaintiff] in danger." 143 F.3d at 1024.

The sixth circuit also rejected the argument made by the Florida Court of Appeals in this case that under *DeShaney*, there is no duty owed because the injuries occurred after the plaintiff was released. The sixth circuit held that under *DeShaney*, if the state renders the person more vulnerable to harm, the substantive due process clause applies. 143 F.3d at 1025.

It is impossible to reconcile *Davis* with this case. In each case the police officers took an intoxicated individual into custody. In each case the police officers released that individual, knowing that he faced dangers if released. In each case a car hit the individual within a few minutes after he was released. Even though all of these facts are identical, in the Sixth Circuit the individual has a cause of action under the Fourteenth Amendment and 42 U.S.C. §1983. In Florida, he does not.

The Florida Court of Appeals' decision, which held that there was no constitutional duty cannot be reconciled with the Sixth Circuit's holding in *Davis*.[6] Under Rule 10, this Court should accept review of this case.

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[6] Under Supreme Court Rule 10(b), the grounds for granting *certiorari* include conflicts between a state court decision of last resort and federal court of appeals. Not included in the language of Rule 10(b) are conflicts between state court decisions and federal district court decisions. However, the grounds for acceptance of *certiorari* are not exclusively those listed in Rule 10. *C.f., Beahlien v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting from denial of certiorari) (Justice White notes that the court has accepted review in important

## II. The decision of the Florida Court of Appeals that there was no substantive due process violation because the injuries did not occur while "in custody" conflicts with the decision of the Sixth Circuit Court of Appeals in *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997).

The Fourth District's opinion focused on the fact that the injuries occurred after Kris Lindquist was released from custody. *Lindquist,* 706 So.2d at 360. Because the injuries occurred after he was released, the court found no constitutional violation. This reasoning directly conflicts with the Sixth Circuit Court of Appeals' decision In *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997).

In *Stemler*, as in this case, the police encountered a drunken individual, briefly held the individual in custody, and released the individual into a dangerous situation. The person was later injured in an automobile accident.

The court of appeals held that there was a special relationship between the police and the individual created by the custodial detention. The breach of the constitutional duty owed by the police occurred when they released the individual from their custody into a dangerous situation. Thus, the individual stated a claim under the substantive due process clause, even though the injuries occurred after their release from custody. 126 F.3d at 867.

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cases, not fitting into any of the three listed categories). The decision of the Florida Court of Appeals also directly conflicts with the decision of the federal district court in *Wagar v. Hasenkrug*, 486 F. Supp. 47 (D. Montana 1980).

While the facts of *Stemler* are slightly different than the facts in this case, the rule of law is the same. Here, the breach of the constitutional duty occurred at the time that the defendants decided to release Kris Lindquist. While one may distinguish the facts, one cannot reconcile the difference in the holding of *Stemler* and the holding in this case. Under Rule 10, this court should grant review.

## III. The decision of the Florida Court of Appeals conflicts with the decision of the Third Circuit Court of Appeals in *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996), which found a substantive due process violation under the "state created danger" theory.

The decision of the Florida Court of Appeals also conflicts with the decision of the Third Circuit in *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996).[7] In *Kniepp* the court found a substantive due process violation under the "state-created danger" theory. Under this theory, if police action increases the danger to an individual, the substantive due process clause imposes a duty upon the police to protect that person, even if the person was not in custody at any time. *Lewis v. Sacramento County*, 98 F.3d 434, 440 (9th Cir. 1996); *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993).

In this case, the complaint alleged that

> Officer Andrew Woronka specifically knew that the neighborhood around the City of Riviera Beach Police Station was more

[7] *Kneipp* was decided on September 8, 1996, two days after the circuit court's decision in this case.

> dangerous that [sic] the area where Kris Lindquist was arrested, and that Kris Lindquist faced dangers in walking home from the police station. This danger included the fact that the police station sits at the intersection of two multiple-lane, heavily trafficked roadways.
>
> Further, Officer Steven Lobeck specifically knew that Kris Lindquist faced increased dangers in attempting to walk home from the City of Riviera Beach Police Station, and Officer Lobeck told Officer Woronka to drive Kris Lindquist home, if necessary to protect Kris Lindquist.

(R.315-316, ¶¶44, 45).

These allegations fall squarely under the state-created danger theory, according to *Kneipp*. In *Kneipp*, the Third Circuit Court of Appeals held that police officers do have a duty to intoxicated persons who come under their care, to not release those persons into a dangerous environment.

In *Kneipp* the plaintiff and her husband had been drinking at a tavern. They were walking home when the defendant Tedder, a Philadelphia police officer, stopped them. 95 F.3d at 1201. Three other police officers then arrived at the scene as the defendant Tedder interviewed the plaintiffs. 95 F.3d at 1201-1202. The plaintiff's husband asked the police officers if he could go home, and one of the police officers said "yeah sure." 95 F.3d at 1202. When the plaintiff's husband started walking home, his wife was leaning on the front of one of the police cars. 95 F.3d at 1202.

The husband went home and waited for the plaintiff, who did not return home. About two hours later, at approximately 1:51 a.m., a police officer found the plaintiff unconscious at the bottom of an embankment. She was suffering from hypothermia, which caused severe brain damage. 95 F.3d at 1203.

The plaintiff then sued the police officers and the City of Philadelphia under 42 U.S.C. §1983. The plaintiff's complaint alleged that the police officers' acts in sending her husband home and leaving her to fend for herself in an obviously intoxicated and impaired condition, violated her substantive due process rights. 95 F.3d at 1203. The defendants moved for summary judgment arguing that no "special relationship" existed between the officers and the plaintiff, and that the "state-created" danger theory did not apply. The district court granted the motion for summary judgment, but the third circuit reversed.

In reversing the district court, the court of appeals first turned to the basics of §1983 liability. The court noted that §1983 "does not, by its own terms, create substantive rights; it provides only remedies for deprivations of rights established elsewhere in the Constitution or federal laws." 95 F.3d at 1204. In the case before it, the plaintiff alleged that her substantive due process rights had been violated.

To examine the plaintiff's substantive due process claims, the court turned to this Court's decision in *DeShaney*. The court of appeals concluded that no "special relationship" under *DeShaney* existed because the plaintiff had not been in custody. 95 F.3d at 1205.

However, the court concluded that a substantive due process violation did exist under the "state created danger" theory. The court of appeals held that *DeShaney* did not foreclose this theory, and that courts following *DeShaney* had expressly held that a substantive due process claim can be stated if the state creates the danger that ultimately led to the plaintiff's harm. 95 F.3d at 1205. While no previous case before the third circuit had presented an opportunity to examine this theory, the court held that the case *sub judice* did present such an opportunity. 95 F.3d at 1205.

Relying in part on *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) *cert. denied*, 498 U.S. 938 (1990) the *Kneipp* court held that summary judgment was inappropriately granted. The court held that there are four common elements to the "state created danger" theory.

> (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

95 F.3d at 1208.

Applying these elements to the facts before it, the court held that summary judgment was inappropriate. First, the court held that the injuries were foreseeable. The plaintiff's blood alcohol level was .25%. This, coupled with other testimony that the plaintiff's ability to walk was impaired would have allowed a reasonable trier of fact to conclude that

the it was foreseeable that the plaintiff would have been injured if not escorted home. 95 F.3d at 1208.

Second, the court found that there was sufficient evidence to conclude that the police officers acted in willful disregard for the plaintiff's safety. The defendant admitted that they knew the plaintiff was drunk, and then lied about sending the husband home separately. 95 F.3d at 1208-1209.

Third, the court found that there was a relationship between the state and the plaintiff during which the state placed the plaintiff in a danger of injury. The court said that this relationship is different from the "special relationship" created by persons in custody under *DeShaney*.

> The relationship requirement under the state-created danger theory contemplates some contact such that the plaintiff was a foreseeable victim of a defendant's acts in a tort sense. The special relationship in *DeShaney*, on the other hand, has a custodial element to it--the state must affirmatively act to restrain an individual's freedom to act on his or her own behalf either through incarceration, institutionalization, or some other comparable limit of personal liberty.

95 F.3d at 1209, fn. 22. (citations omitted). The *Kneipp* court concluded that the defendant, "exercising his powers as a police officer, placed [the plaintiff] in danger of foreseeable injury when he sent her home unescorted in a visibly intoxicated state in cold weather." 95 F.3d at 1209.

Fourth, the court found that the conduct of the police officers made the plaintiff more vulnerable to harm. The court held that "[I]t is conceivable that, but for the intervention of the police, [the husband] would have continued to escort his wife back to their apartment where she would have been safe." 95 F.3d at 1209.

Once again, the parallels between this case and *Kneipp* are compelling. In each case, the police officers came into contact with a visibly intoxicated person. In each case, the person was disoriented and unable to care for his or her own safety. In each case, the situation into which the person was released was dangerous. In *Kneipp*, the danger came from the extremely cold conditions. Here, the danger came from the nature of the area surrounding the police station.

Of course, more compelling in this case that in *Kneipp* is the fact that the Defendants in this case specifically knew of the danger facing Kris Lindquist. Both Woronka and Lobeck expressed concern about Lindquist's ability to get home yet neither took any steps to remove the danger. The complaint alleges that

> Officer Andrew Woronka specifically knew that the neighborhood around the City of Riviera Beach Police Station was more dangerous that [sic] the area where Kris Lindquist was arrested, and that Kris Lindquist faced dangers in walking home from the police station. This danger included the fact that the police station sits at the intersection of two multiple-lane, heavily trafficked roadways.

> Further, Officer Steven Lobeck specifically knew that Kris Lindquist faced increased dangers in attempting to walk home from the City of Riviera Beach Police Station, and Officer Lobeck told Officer Woronka to drive Kris Lindquist home, if necessary to protect Kris Lindquist.

(R.315-316, ¶¶44, 45).

After Kris Lindquist was struck by the car, the complaint also alleged that Defendant Lobeck[8] attempted to conceal the identity of Kris Lindquist and concealed evidence linking him to a recent arrest by the police department. (R.318, ¶54). The court in *Kneipp* stressed that the defendant's actions in falsely testifying that he sent the plaintiff home with her husband was relevant to the issue of knowledge. 95 F.3d at 1208-09. Defendant Lobeck's similar actions, seeking to "cover up" the fact that Kris Lindquist had just been released, also demonstrate knowledge by Lobeck sufficient to impose liability.

Here, the complaint alleges that the Defendants placed Kris Lindquist in a position of danger then released him without taking any steps to protect him from that danger. Under the "state created danger" prong of the substantive due process guarantee, the complaint states a cause of action for deprivation of Kris Lindquist's substantive due process rights.

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[8] Paragraph 54 begins "Officer Woronka . . . ." This is a typographical error, as the paragraph then discusses what Officer Lobeck did. (R.318, ¶54).

The only way to "reconcile" the Florida Court of Appeals' decision with *Kneipp* is to ignore the facts as alleged in the complaint. This is precisely what the Florida Court of Appeals did. The court ignored the allegations of the Fourth Amended Complaint and substituted its own conclusions about the "facts." According to the Fourth District, both the site of Kris Lindquist's arrest and the site of his release were on the same street, so there was no harm. *Lindquist*, 706 So. 2d at 361. This conclusion ignored the allegations that the place of arrest was different from the place of release, an intersection of two multiple-lane, heavily traveled highways.

Unfortunately, the Fourth District did not explain the nature of the testimony that supported its conclusion. Nor did the Fourth District explain the legal principle that allowed it to substitute its own view of the facts for the allegations in the complaint, violating the fundamental principle of appellate review on a motion to dismiss under FLA. R. CIV. PROC. 1.140(b)(6). Under that rule, the only facts presented for review are the facts stated in the "four corners" of the complaint. *Pizzi v. Central Bank and Trust Co.*, 250 So. 2d 895, 897 (Fla. 1971).

Finally, the Fourth District labeled as "troublesome" the fact that the two officers knew that Kris Lindquist faced dangers if released alone, yet did nothing to prevent that danger and took steps to conceal Kris Lindquist's identity. 706 So.2d at 362, fn. 4. This was far more than merely "troublesome." Instead, the officer's specific knowledge of the risk of harm to Kris Lindquist made him a "foreseeable plaintiff" sufficient to impose liability under the "state

created danger" theory. *See, Martinez v. California*, 444 U.S. 277, 285 (1980).

The Florida Court of Appeals' decision cannot be reconciled with the Third Circuit Court of Appeals' decision in *Kneipp*. Under Rule 10, this court should accept review of this matter.

## CONCLUSION

This case falls squarely within Rule 10's requirements for review by this court. If this case is not reviewed, at least in Florida, police departments will be able to release prisoners without regard for the perils confronting those prisoners. It is easy to conceive of whole categories of custodial arrestees, including the mentally ill, who can be released without regard to the conditions of their release. If they are struck by cars or die of exposure, there is no constitutional liability. Even more troubling is the possibility that other courts will follow the Florida Court of Appeals' lead and use a similar analysis.

Even absent further action by other courts, we now have two different constitutional schemes: one scheme protecting custodial detainees in the Third and Sixth Circuits, and another scheme, providing no protection for custodial detainees in Florida. This court should review this case, both to resolve this conflict and to forestall any further erosion of the Fourteenth Amendment's substantive due process clause.

Respectfully submitted,

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# APPENDIX

**Supreme Court of Florida**

MONDAY, JULY 27, 1998

KRIS LINDQUIST,

Petitioner,

V.

ANDREW WORONKA, et al.,

Respondents

**AMENDED ORDER**

CASE NO. 92,492

District Court of Appeal, 4th District - No. 96-3021

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

HARDING, C.J. and OVERTON, WELLS, JJ. and KAHN, visiting judge, concur. SHAW, KOGAN and ANSTEAD, JJ., dissent.

A True Copy

Teste
/s/
Sid J. White
Clerk, Supreme Court

Hon. Marilyn N. Beuttenmuller, Clerk
Hon. Dorothy H. Wilken, Clerk
Hon. Jack H. Cook, Judge
Mr. Reed Millsaps
Mr. Anthony J. Palmer
Mr. Glen Torcivia
Mr. Don Stephens
Mr. Stephen F. Radford, Jr.
Ms. Karen Childers
Ms. V. Lynn Whitfield

706 So.2d 358
23 Fla. L. Weekly D337
**(Cite as: 706 So.2d 358)**

Kris Linduist, Appellant,
v.
Andrew Woronka and Steven Lobeck,
Appellees.

No. 96-3021.

District Court of Appeal of Florida, Fourth District.

Jan. 28, 1998.

PER CURIAM.

Appellant, Kris Lindquist (plaintiff), appeals the trial court's dismissal with prejudice of those counts of his fourth amended complaint which are against appellee police officers Andrew Woronka and Stephen Lobeck (defendants).[1] Claiming that defendants' conduct deprived him of due process, plaintiff sought to impose individual liability on defendants, pursuant to 42 U.S.C. §1983, for injuries he sustained in a traffic accident after being released from police custody. Because we find that the officers did not have a special relationship with plaintiff requiring them to protect him at the time he was injured, and were not otherwise legally responsible for acting to create the dangerous

[1] The counts against the City of Riviera Beach are still pending and are not involved in this appeal.

situation that resulted in his injuries, we affirm the trial court's dismissal.

On January 31, 1993, plaintiff was arrested by defendants while they were on duty with the City of Riviera Beach Police Department. At the time of his arrest, plaintiff was intoxicated, disoriented, confused, unaware of his surroundings, and otherwise incapacitated. After his arrest, defendants drove plaintiff approximately two miles to the City of Riviera Beach Police Department headquarters. There, pursuant to department policy, plaintiff was charged with disorderly conduct,[2] and then released with a notice to appear at a future court date.

After his release, while crossing the highway near the police station on foot, plaintiff was struck by a vehicle. As a result of the accident, plaintiff suffers from various permanent injuries including: paralysis of one side of his body; traumatic brain injury; vision impairment; loss of mobility and loss of ability to communicate. He requires full-time care.

Plaintiff does not allege that he was falsely arrested or falsely imprisoned. Rather, he claims the opposite--that defendants should have kept him in custody for his own protection because he was obviously inebriated. Alternatively, plaintiff alleges that the police officers should

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[2] Plaintiff alleges that the decision to charge him with disorderly conduct instead of disorderly intoxication was pursuant to a policy and procedure adopted by the City of Riviera Beach in order to avoid "proof problems" at trial. The allegations of a governmental policy constituting a violation do not form the basis for imposing individual liability on the police officers.

have driven him home. Plaintiff claims that defendants instead knowingly released him from the City of Riviera Beach Police Station, "an area more dangerous than the area where [he] was arrested," thus exposing him to increased danger.

The trial court dismissed the civil rights claims against defendants, after allowing plaintiff three previous amendments, on the basis that the defendants' action, or inaction, did not rise to the level of a constitutional violation, pursuant to 42 U.S.C. §1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State ... subjects, or causes to he subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proof p~ for redress.

When considering the propriety of the trial court's dismissal of the complaint or counts of the complaint under §1983, this court must consider all the allegations contained in the complaint to be true. *See Hughes v. Rowe*, 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 0980); *Harris v. Monds*, 696 So.2d 446 (Fla. 4th DCA 1997). To state a cause of action for violation of §1983, the plaintiff must allege that a person, acting under color of state law, deprived him of rights protected under the federal constitution, or federal laws. *See Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). Complaints alleging a violation of this statute

should not be dismissed unless it is clear that plaintiff is entitled to no relief under any facts given in support of the claim. *See Southern Alliance Corp. v. City of Winter Haven*, 505 So.2d 489 (Fla. 2d DCA 1987) (citing *Cruz v. Cardwell*, 486 F.2d 550 (8th Cir. 1973)).

The trial court relied on *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), in dismissing the complaint against defendants. In that case, after being returned to his father's care by Winnebago County social services despite repeated warnings and signs that he was in danger, four-year-old Joshua DeShaney was beaten so severely by his father that he suffered permanent brain damage and was left profoundly retarded.

The DeShaneys brought an action under §1983 against the county and individual social workers, alleging that the defendants deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, "by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known." *Id.* at 193,109 S.Ct. at 1002.

The Supreme Court affirmed summary judgment in the defendants' favor, holding that the defendants' failure to protect Joshua from his father's violence did not violate Joshua's substantive due process rights. In reaching this conclusion, the Supreme Court recognized that:

> Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the

> grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father.

*Id.* at 202-03, 109 S.Ct. at 1007.

The Supreme Court rejected the DeShaneys' claims that a "special relationship" existed between the defendants and Joshua DeShaney such that they had a duty to provide protective services. The Supreme Court recognized, however, that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals ... because the person is unable 'by reason of the deprivation of his liberty to care for himself....'" *Id.* at 199, 109 S.Ct. at 1005.

> Taken together, [these cases] stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.

*Id.* at 199-200, 109 S.Ct. at 1005. The Supreme Court found that this "special relationship": analysis had no applicability in the DeShaney case because Joshua was not in the state's custody when he was injured by his father.

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf--through incarceration, institutionalization, or

> other similar restraint of personal liberty--which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

*DeShaney*, 489 U.S. at 200, 109 S.Ct. at 1006.

Recognizing that the circumstances may have imposed upon defendants the duty to act under state tort law, the Supreme Court concluded that the Due Process Clause of the Fourteenth Amendment "does not transform every tort committed by a state actor into a constitutional violation." *Id.* at 202, 109 S.Ct. at 1006 (emphasis supplied). Because "the State had no constitutional duty to protect Joshua against his father's violence, its failure to do so--though calamitous in hindsight-simply does not constitute a violation of the Due Process Clause." *Id.*

Here, plaintiff was not in custody at the time of the accident, nor was his liberty otherwise restrained. Thus, we find that plaintiff's first theory of liability, based on a special relationship, does not apply. Rather the basis for liability, if any, would derive from the following statement in *DeShaney*:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it

> not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

*Id.* at 201, 109 S.Ct. at 1006 (emphasis supplied).

Although this alternative basis for liability under the due process clause is only *dicta* in *DeShaney*, subsequent federal court decisions have labeled it the "state-created danger" theory.[3]

In this case, the allegations against defendants, that after properly arresting plaintiff they brought him to the police station and subsequently released him, are insufficient to state a cause of action under the state- created danger theory. This case is a far cry from the case most favorable to plaintiff's position, *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996).

In *Kneipp*, the plaintiff was walking home with her husband, after midnight, when the two were stopped by the defendant police officers for creating a disturbance on a public highway. In an effort to separate the spouses, police sent the husband home and left the plaintiff on her own, despite the fact that the plaintiff was visibly drunk and unable to walk or care for herself. The plaintiff was found hours later at the bottom of an embankment across the street from her

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[3] *See Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996); *Reed v. Gardner*, 986 F.2d 1122 (7th Cir.1993); *Gregory v. City of Rogers, Arkansas*, 974 F.2d 1006 (8th Cir. 1992), and cases cited therein; *see also Wyke v. Polk County School Bd.*, 129 F.3d 560, 567 (11th Cir. 1997), and cases cited therein.

home, unconscious and suffering from hypothermia, resulting in severe and permanent brain damage.

The third circuit rejected a theory of liability predicated on a special relationship because the plaintiff was not injured while in police custody, but found a jury could hold defendants liable under the state-created danger theory. The court found that there was sufficient evidence to show that the defendant police officers used their authority to create a dangerous situation or to make the plaintiff more vulnerable to danger than had they not intervened. In sending her husband home, and allowing plaintiff to go home unescorted in a seriously intoxicated state in cold weather, they made her more vulnerable to harm. The court reasoned:

> It is conceivable that, but for the intervention of the police, [the plaintiff's husband] would have continued to escort his wife back to their apartment where she would have been safe. A jury could find that [the plaintiff] was in a worse position after the police intervened than she would have been if they had not done so. As a result of the affirmative acts of the police officers, the danger or risk of injury to [the plaintiff] was greatly increased.

Id. at 1209.

Here, plaintiff was initially arrested in the area of Blue Heron Boulevard, a multiple-lane highway, and then transported two miles to the City of Riviera Beach Police Department, which is also located on Blue Heron Boulevard. Although plaintiff alleges that defendants placed him in a more dangerous position by his arrest and release, the release

of plaintiff at the Riviera Beach police station which happens to be located near an intersection, is insufficient, under the cases on which plaintiff relies, to impose civil rights liability on defendants.[4] No court has yet found a violation of an individual's due process rights under similar facts. We have considered plaintiff's remaining arguments and find them to be without merit.

AFFIRMED.

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[4] There are two additional allegations. First, plaintiff alleges that Officer Lobeck told Officer Woronka to drive plaintiff home, if necessary, "to protect Kris Lindquist's safety." Second, plaintiff alleges that Officer Woronka went to the accident scene and "removed the identification from Kris Lindquist's person" in order to "conceal the culpability of the Riviera Beach Police Department." Although these allegations are troublesome, they do not constitute a basis for imposing individual liability on the police officers under §1983 as a violation of plaintiff's constitutional rights.